No. 439

Supreme Court of the United States

OCTOBER TERM, 1958

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED, *Petitioner,*

v.

AETNA FREIGHT LINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OCTOBER, 1958.

INDEX

CITATIONS

Cases:

Cases—continued

Constitutional Provision and Statutes:

Miscellaneous:

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Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit, which reversed a judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The opinion of the District Court (R. 207a-225a) is reported at 161 F. Supp. 875. The opinion of the Court of Appeals (App., p. i) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1958 (App., p. v). A timely petition for rehearing was denied on August 14, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 1 *et seq.*, provides, in the absence of an express election to the contrary, an exclusive administrative remedy for the death of an "employee" who is not "casual" and whose employment is "in the regular course of the business of the employer." As a matter of State court practice, the "employee" status is held to be a "question of law."

This is a federal diversity case brought by petitioner for wrongful death. Respondent, at the conclusion of the taking of testimony, made no request for the submittal of the issue of "employee" status for resolution by the jury; nor did it object to the court's failure to instruct on this issue. A jury verdict was returned for petitioner. The District Court thereafter denied motions to set aside the jury's verdict. The Court of Appeals, adhering to State practice as to the court's function, reversed, ruling that the Workmen's Compensation Act applied, and the suit for wrongful death must be dismissed. The Court held that petitioner's decedent was respondent's emergency "employee", and his employment was in the "regular course" of respondent's business. Thus there is presented the same basic question as in *Byrd* v. *Blue Ridge Rural Electric Cooperative*, Inc., 356 U.S. 525. That question is:

1. In a diversity case in a federal court, is the issue of whether petitioner's decedent was an employee, and whether his employment was in the regular course of respondent's business within the meaning of the Pennsylvania Workmen's Compensation Act, a question for jury determination?

If certiorari is granted, the further question presented will be:

2. Where respondent failed to request the trial court to submit the issue of petitioner's employee status under the Workmen's Compensation Act to the jury for determination on proper instructions, but instead obtained an erroneous reversal by the Court of Appeals which treated the issue as a matter of law, should the jury verdict in favor of petitioner be now reinstated, or is there some necessity for retrial?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment to the United States Constitution. The statutes involved are Rule 51 of the Federal Rules of Civil Procedure, and Sections 104, 203, 302(b), and 427 of the Pennsylvania Workmen's Compensation Act (77 PURDON'S PA. STAT. ANN. §§ 22, 52, 462, 872). The texts of these provisions are set forth in the Appendix at pages vi-viii.

STATEMENT

This case was brought by petitioner in the federal district court on the basis of diversity jurisdiction. Petitioner, as administrator of the estate, sued for the wrongful death of Norman Ormsbee, Jr., a youth of twenty years, who died on March 20, 1956, survived by a widow and three small children. He died in a crash of a tractor-trailer operated by respondent. The truck was en route with 36,000 pounds of steel from Syracuse, New York, to Midland, Pennsylvania, a distance of 350 miles. The accident occurred near Rochester, Pennsylvania, when the truck failed to negotiate an S turn downhill. Petitioner's decedent, who had been riding in the truck for a short distance, and the driver,

Schroyer, were both instantly killed. The tractor-trailer was leased, complete with driver, to respondent by the owner of the truck, one Fidler.

The jury returned a general verdict for $76,400, noting on the verdict slip, without direction by the court, that it found defendant "guilty of wanton conduct, in failing to maintain the braking equipment on the vehicle in proper working order on the night of March 20, 1956, which wanton conduct was the cause of the death of Norman Ormsbee, Jr." (R. 198a-199a). The jury also answered, in a fashion consistent with the general verdict, four special interrogatories prepared by the trial judge (R. 199a-200a), who prior to his advent to the bench had been an experienced Pennsylvania practitioner. Respondent's motions for a new trial and for judgment n.o.v. were denied by the trial court (R. 206a).

The Court of Appeals reversed the judgment below, holding that as a "question of law", which it could resolve, petitioner's status was that of an "employee" whose only remedy was under the Pennsylvania Workmen's Compensation Act. A timely petition for rehearing, principally addressed to a stay of proceedings, was denied.[1]

[1] In order to prevent the running of the Statute of Limitations, petitioner filed an administrative claim for workmen's compensation, which has remained dormant. Respondent denied responsibility and presumably is prepared to litigate once more the question of whether Ormsbee was an "employee" within the meaning of the Act. To prevent an unjust result, petitioner urged the Court of Appeals on rehearing to retain jurisdiction of this case by issuing a stay pending development of the Workmen's Compensation case —and particularly respondent's defense thereto. If certiorari is granted, petitioner reserves the right to urge this point once again, if this Court should disagree with petitioner's principal contention that the Court of Appeals erred in reversing the judgment below.

The evidence established that the respondent had operated defective leased equipment. In fact, as the trial judge noted in his opinion (R. 220a), neither respondent's evidence, nor any contention advanced by it, suggests that respondent made any routine inspection of Fidler's equipment before leasing it. Maintenance and repair of Fidler's truck was under the latter's control, although the equipment had been under lease to respondent for at least four years. Fidler himself did not perform such functions, but used an independent garage in a city near his home (R. 122a). Thus the ordinary repair of Fidler's equipment was certainly not in the hands of respondent.

Schroyer's trip from Syracuse which resulted in the double fatality was remarkably beset by a combination of unusual difficulties. Schroyer picked up his load on March 13, 1956, in Syracuse for a 350-mile journey which was expected to take 20 hours, including resting time. Because of the accumulation of unanticipated difficulties, Schroyer was still on his way seven days later when the accident occurred.

During the seven-day period that Schroyer was en route, he was constantly in touch with Fidler, who had hired him three weeks before and to whom he regularly looked for instructions (R. 122a-132a). For example, shortly after the trip commenced, Schroyer lost two tires in Batavia, New York. He communicated with Fidler, who proceeded from his base in Pennsylvania to Batavia with replacement equipment. Fidler there instructed Schroyer not to proceed under certain anticipated weather conditions, and then departed. Again, when Schroyer later encountered battery trouble in Buffalo, he was in touch with Fidler, who specified the garage to be used for repair. Moreover,

it required specific authorization by Ridler for Schroyer to obtain an advance of funds from the Buffalo regional manager of respondent (R. 64a).

After advising respondent's Buffalo representative about brake trouble, and after a wholly superficial test of the brakes was made, Schroyer proceeded to Waterford, just south of Erie, Pennsylvania, having completed slightly more than 230 miles of the journey. Schroyer stopped at Jones' Tavern just south of Waterford and there met Ormsbee and the latter's companion, Brown. Schroyer complained that he was having trouble with his equipment and offered to give Brown $25 to ride with him for the balance of the trip, because he was afraid that he might run into more trouble. Brown refused, but Ormsbee accepted when the proposition was then put to him (R. 35a, 38a, 39a-40a, 48a).

Ormsbee was not authorized to drive in Pennsylvania, since his license there had been revoked (R. 106a). Moreover, there is nothing in the record to indicate that Ormsbee under any circumstances was expected to drive the truck, and in fact the evidence is that he was not driving the truck when the accident occurred (R. 19a, 49a). Ormsbee had had extensive experience with cars and had worked as a mechanic, although what Ormsbee was expected to do in the event of "trouble" was not defined.

The two men left the tavern, and were seen to proceed in a southerly direction, with Schroyer in the driver's seat (R. 49a). There is no further evidence of their whereabouts until the discovery of the wrecked vehicle some five hours later, with both men dead.

Respondent's chief purpose throughout the trial was to establish that Ormsbee was a trespasser, so as to

eliminate liability unless petitioner established wanton negligence.[2] The evidence shows that the truck carried a "No Rider" sign. Moreover, both Fidler and respondent had instructed Schroyer that he was to carry no riders. Schroyer, in a written response to a question as to the circumstances under which he might have a rider, responded "No time." This answer, according to the testimony, was the only one acceptable to the respondent, and thus represented its company policy (R. 132a, 141a, 142a).

In pursuing its purpose to show that Ormsbee was a trespasser, respondent made no effort to establish that any of its trucks were ever manned with two drivers; nor to show that they ever were manned with a driver and a non-driving mechanical or other assistant; nor to show that at any time in the past it had ever permitted anyone to ride on one of its trucks for a business purpose. And certainly it made no effort to show that any past emergency had ever necessitated an employee of respondent engaging either an emergency employee or an emergency agent on its behalf to ride on any of its equipment. The inference, rather, is clear that Ormsbee as a rider was performing a highly extraordinary and unexpected function.

At one stage of the trial, the judge informally commented to counsel that Ormsbee appeared to be a trespasser, but that the submission of special interrogatories might help clarify the jury's view on this and related questions (R. 119a). At the conclusion of the taking of testimony, the court in fact framed four pertinent special interrogatories which it submitted for

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[2] *Cf. Erie R. Co.* v. *Tompkins*, 304 U.S. 64, involving one aspect of this Pennsylvania rule.

answers by the jury, to be returned along with a general verdict. Interrogatory No. 1 was to determine the jury's view as to whether Ormsbee was some sort of business licensee to whom respondent owed a duty of ordinary care. The interrogatory read:

> "Interrogatory Number 1. Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?"

To this interrogatory the jury responded in the affirmative.[3]

In a colloquy with counsel, before submitting this interrogatory to the jury, the trial judge carefully noted that this interrogatory had been framed so as not to inquire whether Ormsbee was an employee of respondent, because that was a question of law for the court. The trial judge stated during this colloquy:

> "Number 1 I think is directed at one of the issues here. I have said, you see, you notice there I refrain from saying just what his status is. I

[3] The other interrogatories inquired whether respondent was negligent, to which the jury responded in the affirmative; whether the braking equipment was in proper working order, to which the answer was in the negative; and whether respondent was guilty of wanton conduct in failing to maintain the braking equipment in proper working order, to which the answer again was in the affirmative. The jury thus found the necessary wanton conduct to make it immaterial whether Ormsbee was a trespasser, but also by its answer to Interrogatory No. 1 found that Ormsbee was not a trespasser (R. 199a-200a).

don't think it is necessary to have the jury find whether he was employed or not; I think that is a question for the law. We might have to look at that afterwards, it depends on what you think of it." (R. 169a)

The respondent did not challenge this procedure of reserving the question for the court as to Ormsbee's status, and this is a matter of utmost significance.

Respondent submitted to the court certain requested instructions. Among these was its Request No. 7. This asked for a binding instruction to the jury that the Pennsylvania Workmen's Compensation Act provided the exclusive remedy if the jury found an emergency existed which justified Schroyer in hiring an assistant.[4] Respondent in due course excepted generally to the charge, and also excepted to the failure to give this binding instruction (R. 197a). However, although specifically invited by the court to ask that additional instructions be given the jury, respondent did not request the court to instruct the jury on the "employee" question, so as to permit the jury to decide the issue without a binding instruction (R. 195a-196a). Since this is important, it should be stressed that respondent did not request that the jury be instructed to consider and determine whether Ormsbee was em-

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[4] Respondent's Request No. 7 read as follows:

"If you find that an emergency actually existed which justified the driver, Schroyer, in hiring an assistant to help him with the work that Schroyer was required to do for Aetna Freight Lines, Inc. and Schroyer did hire Ormsbee for this purpose, then your verdict must be for the Defendant in this case because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for injury or death in such a circumstance."

ployed "in the regular course of the business of the employer." Respondent did not even ask for an instruction to the jury to determine whether Ormsbee was an employee as opposed to an agent, and if so, whether he was an employee of respondent.

After the jury's verdict was returned, respondent moved for a new trial and for judgment n.o.v. Respondent contended that Ormsbee was a trespasser and that the record did not support either the special findings of an emergency situation, or of wanton negligence. Alternatively, respondent urged that Ormsbee was an "employee" within the meaning of the Workmen's Compensation Act, so as to bar the instant suit and provide an exclusive administrative remedy. Respondent conceded that Ormsbee's employment was "casual," within the meaning of the Act, but contended that the employment was "in the regular course of respondent's business."[5]

The trial court denied respondent's motion, and once again specifically called attention to the fact that Special Interrogatory No. 1

> "was simply to secure a finding from the jury as to the reasonable necessity of Schroyer engaging

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[5] Respondent also urged in its brief in support of its motions that Ormsbee was within the coverage of the Act because of a specific provision dealing with "employees of employees." One of the main point headings in respondent's brief was the following:

> "The Pennsylvania Workmen's Compensation Act expressly provides that its provisions shall apply to employees of employees; 77 P. S. § 462."

See also, 77 PURDON'S PA. STAT. ANN. § 52. The trial judge in his opinion specifically rejected this contention, pointing out that the law applied only to "employees of employees" operating on respondent's "premises." (R. 211a).

decedent to accompany him on the remainder of the trip in protection of defendant's interests." (R. 21a)

The trial judge thus reiterated the view that he had expressed before submitting the interrogatory to the jury that the interrogatory was so framed as to reserve to the court the question of Ormsbee's status as an "employee" within the coverage of the Act.

The Court of Appeals reversed the judgment below. The Court held that Ormsbee's status was a "question of law" and "open to review." In so deciding, the Court relied principally upon a secondary treatise on the Pennsylvania Workmen's Compensation Act, which dealt with State court practice.

The Court of Appeals, relying on Pennsylvania decisions, correctly defined "regular course of the business" as depending upon whether the employment was an "ordinary operation," or, stated somewhat differently, the "normal operations which regularly constitute the business" of the employer. The Court, however, surprisingly concluded that since Ormsbee was properly on the truck by virtue of the emergency, this

> "put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all." (App., p. 5).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decision of this Court entered on May 19, 1958, in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525. The *Byrd* case held that in a federal diversity case, the factual question of

whether there is employment status under the Workmen's Compensation Act which would bar relief in a suit for wrongful death, is for the jury. This Court decided that *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, does not require that the federal court follow state practice when it is contrary to the federal rule favoring jury trial.

As is developed in the Statement, Ormsbee's status as an employee, and particularly his status as an employee in the "regular course of the business" of respondent, was treated below as a question of law for the court to resolve. The Court of Appeals reached its decision in reliance on Pennsylvania practice as to the function to be performed by the court.

The case below was briefed and argued prior to the announcement of this Court's opinion in *Byrd.* However, the Court of Appeals entered its decision on July 17, 1958, without any reference to the *Byrd* decision. It is a matter of importance to conform the practice in the Third Circuit and other circuits to that which will now prevail under *Byrd* in the Fourth Circuit.

The granting of certiorari is particularly appropriate in the instant case because it readily lends itself to summary treatment. With the clear delineation of the law in *Byrd,* this case could be disposed of on a Summary Docket basis, or by summary reversal. It is because of the latter possibility that the nature of the order of this Court is discussed in point 4, *infra.*

2. The recitation of the proceedings below in the Statement demonstrates the manifest failure of the Court of Appeals to follow the *Byrd* decision. Respondent, in the trial court, did not request that the jury be instructed to determine on the facts whether Ormsbee was an employee within the meaning of the

Workmen's Compensation Act, and more particularly did not request an instruction on Ormsbee's status in the "regular course of the business" of the respondent. The trial judge, in keeping with his view of Pennsylvania practice, was content to treat the issue as a matter of law. The Court of Appeals likewise held that the issue was a "question of law" for it to decide under Pennsylvania practice, although reaching the opposite conclusion as to the applicability of the Act.

The Court of Appeals specifically stated that it was deciding the question as one of law in reliance on SKINNER, a secondary treatise on the Pennsylvania Workmen's Compensation Act.[6] The Court quoted SKINNER as holding the issue to be "a question of law, and open to review." (See opinion, App., p. v). Here again, the parallel to *Byrd* is manifest, because SKINNER, in defining Pennsylvania practice, was primarily concerned with the circumstances under which a court might "review" the decision of the Workmen's Compensation Board, the administrative tribunal which decides compensation cases. The applicable statutory section, 77 PURDON'S PA. STAT. ANN. § 872, provides for an appeal to the courts from any action of the Board "on matters of the law." Consequently, while factual questions are for the administrative tribunal, questions of law may be reviewed by the court.

It will thus be appreciated that the underlying reason for the Pennsylvania practice declaring employment status to be a matter of law for the court is to permit judicial review of the decisions of the administrative board. *Callihan* v. *Montgomery,* 272 Pa. 56, 115 Atl.

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[6] SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW (4th ed. 1948).

889 (1922); *Blake* v. *Wilson,* 268 Pa. 469, 112 Atl. 126 (1920); *Passarelli* v. *Monacelli,* 121 Pa. Super. 32, 183 Atl. 65 (1936); *Boyd* v. *Philmont Country Club,* 129 Pa. Super. 135, 195 Atl. 156 (1937); *Barnett* v. *Bowser,* 176 Pa. Super. 17, 106 A.2d 457 (1954).

However, the Pennsylvania practice has generally been carried over to tort cases brought in the state courts.[7] When issues of employment status arise, which possibly would defeat the action and require the plaintiff to look solely to workmen's compensation for relief, the courts hold that the question is a matter of law for the court. *Vescio* v. *Pennsylvania Electric Co.,* 336 Pa. 502, 9 A.2d 546 (1939); *Persing* v. *Citizens' Traction Co.,* 294 Pa. 230, 144 Atl. 97 (1928).

While the Pennsylvania practice of withholding from the jury the decision as to the applicability of the Workmen's Compensation Act is common, as can be seen from the instant case and the other cases cited *supra,* it should be pointed out that this practice is not basic. It cannot be deemed to be an integral and fundamental part of the Pennsylvania statutory scheme, so as to have some special claim for respect under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64. See *Walters* v. *Kaufmann Department Stores, Inc.,* 334 Pa. 233, 5 A.2d 559 (1939).[8] Thus it would not do violence to the Pennsylvania statute for this Court to follow its "strong federal policy against allowing state rules to disrupt

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[7] This Court, in *Byrd,* noted that the South Carolina practice was similarly carried over from the procedure on review of decisions of the Industrial Commission. 356 U.S. at 536.

[8] In this common law action, the question of employment status was presented, though not the question of "regular course of the business." The issue was treated as a question for determination by the jury.

the judge-jury relationship in the federal courts." *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. at 538. In any event, the *Byrd* case has made it clear that jury trial of workmen's compensation cases is not a substantive issue on which the state rule must prevail under *Erie R. Co.* v. *Tompkins, supra.*[9]

3. In the instant case, there was a real question of employment status. If petitioner were to be barred from recovery for respondent's tortious conduct, it was for the jury, and not the court, to make that decision. The record provides a substantial basis from which the jury, if it believed the testimony, could infer (a) that Ormsbee was not respondent's employee at all, but a business licensee; or (b) that in any event, in the unusual situation prevailing, he clearly was not engaged in the "regular course" of respondent's business.

The complex relationship among the truck driver Schroyer, the lessor Fidler, and the respondent patently presents a jury question as to who, if anyone, was Ormsbee's employer when he was engaged by Schroyer during his stop at the tavern. Cf. *Gearhart* v. *Summit Fast Freight, Inc.*, 167 Pa. Super. 481, 75 A.2d 606 (1950); *D'Alessandro* v. *Barfield*, 348 Pa. 328, 35 A.2d 412 (1944). More importantly, a jury, if presented with the issue of employment in the "regular course of the business," could well have concluded that the extraordinary, but brief, mission of Ormsbee as a non-driving, but traveling mechanic or emergency helper, did not qualify him for workmen's compensation coverage. This becomes clear upon considering

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[9] The Constitutional guarantee of jury trial would likewise suggest the same result, though this issue was not reached in the *Byrd* case. 356 U.S. at 537, fn. 10.

the Pennsylvania courts' long-established construction of the statutory provision, 77 PURDON'S PA. STAT. ANN. § 22, which excludes "persons whose employment is casual in character and not in the regular course of the business of the employer."

The leading case in defining "regular course" is *Callihan* v. *Montgomery,* 272 Pa. 56, 115 Atl. 889 (1922), in which the court stated:

> "The legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . ." (272 Pa. at 72, 115 Atl. at 895).

See also, *Blake* v. *Wilson,* 268 Pa. 469, 112 Atl. 126 (1920); *Ciccocioppo* v. *Rocco,* 172 Pa. Super. 315, 94 A.2d 77 (1953). This test of "normal operations," quoted by the Court of Appeals in its opinion (App., p. v), does not require resort to any rigid formula for its application. It is a question of what inferences should be drawn from the facts.

The decision of the Court of Appeals, premised as it was on the erroneous conclusion that the question was one for it to decide, shows that it failed to face up to the question of the "normalcy" of the operation in which Ormsbee was engaged. The Court simply stated that "the hiring of Ormsbee put him into the regular business of defendant, namely, *transportation of goods by truck.*" (App., p. v). (Emphasis supplied.) If anything is clear, it is that Ormsbee had nothing to do

with the transportation of goods by truck. He did not drive; he was not licensed to drive; and he was not expected to drive. If a breakdown had occurred, presumably Ormsbee would have helped in a mechanical or related capacity in meeting the "trouble" which led to his engagement in the first place. His services were not the "transportation of goods by truck," but the prospective handling of broken-down equipment owned by the lessor Fidler.

Of course it is possible for a company which is engaged in the "transportation of goods by truck" to perform other connected functions. These functions, if ordinarily performed by the company itself, may be in the "regular course of the business" of the company, even though not involving transportation of goods by truck. *Cf. Callihan* v. *Montgomery, supra,* distinguishing emergency repair of machinery from ordinary maintenance operations. See also, *Butera* v. *Western Ice & Utilities Co.,* 140 Pa. Super. 329, 14 A.2d 219 (1940). However, the Court of Appeals was content to classify Ormsbee as an employee in "regular course" by simply stating that he was engaged in the transportation of goods.

In the instant case, it appears that even the ordinary repair functions performed on equipment leased from Fidler and others was handled for respondent by independent contracting garagemen, rather than as a routine supplementary function of the respondent's business. Thus respondent did not do even this kind of work *regularly.* Be that as it may, the testimony shows how far removed from "ordinary" or "normal" was the transportation of Ormsbee in the emergency.

Ormsbee's role arose out of an emergency due to a week-long ordeal in covering the distance of a day's

journey. Ormsbee was engaged by an underling who was under strict orders that he was to have "no riders" with him at any time. The respondent and Fidler did not normally operate trucks with employees whose functions were those which Orsmbee was to provide. Respondent itself was to insist throughout the trial that, in relation to its operation, Ormsbee's role was so far from normal or routine that he was a trespasser. Only the extraordinary course of events justified the emergency engagement of Ormsbee to perform unusual functions in respondent's interests. The inference is that in respondent's normal operation, it neither provided roving mechanics, riding assistants, nor $25-a-trip short-haul companions.

If presented with the question, the jury might well have concluded that Ormsbee was not engaged in the transportation of goods, and was not otherwise engaged in what would be considered a "normal operation" of respondent. The jury could have adhered to its view that the very abnormality of the operation and situation at hand meant that Ormsbee was not a trespasser on the truck, but had a business purpose to perform. At the same time the jury could have found that Ormsbee's role in respondent's affairs was not that of an employee in the "regular course" of the latter's business.

The question of employment by respondent, rather than by Fidler or Schroyer, and the question of whether this employment was in the "regular course" of respondent's business, involve a weighing of the facts and the inferences from the facts. While Pennsylvania precedents in other factual situations do not provide significant guidance, a few cases should be examined. The Court of Appeals relied heavily on *Persing* v. *Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928). There the hauling away of a stalled trolley was held

to be in the regular course of business of the trolley company. The hiring of a tractor and driver to perform the job was far from extraordinary, because the same tractor and driver had been hired only thirty days before for the same purpose.

The Pennsylvania Supreme Court has held more recently, in *Vescio* v. *Pennsylvania Electric Co.*, 336 Pa. 502, 9 A. 2d 546 (1939), that the emergency employment of a passerby to help remove another employee of an electric power company, when he had become entangled in the power lines, was not in the "regular course" of the defendant's business. Therefore, a suit for damages would lie when the passerby, who had become an emergency employee, was injured by the carelessness of another employee of the defendant. The function of providing electric power could not go forward until the man was removed, because pending his being extricated the power lines had to be shut off. But the Court thought the service rendered was not "regular" because rendered "under an abnormal, unexpected and accidental circumstance." 336 Pa. at 507, 9 A. 2d at 549.

In view of *Vescio*, a jury determination that Ormsbee was not engaged in the "regular course" of respondent's business would have been reasonable. *Heckman* v. *Warren*, 124 Colo. 497, 238 P.2d 854 (1951), points to the same conclusion. This recent decision by the Colorado Supreme Court was reached under a statute construed identically to the Pennsylvania courts' construction of the "regular course" provision. In the *Heckman* case a truck en route on the highway caught fire. A gasoline station attendant, whose assistance was sought, boarded the truck to help put out the fire. While the Court held the attendant an emergency employee of the trucker, the employment was not in the

"normal operations constituting the regular business of the employer." 124 Colo. at 509, 238 P. 2d at 860.

In summary, the fact question as to Ormsbee's status properly belonged with the jury. The Court of Appeals did not consider whether there was any reasonable basis for a jury determination in favor of petitioner on this point, because the Court simply followed State practice reserving the issue to the court.

4. The second question presented is whether this Court should direct a reinstatement of the jury verdict, or whether a retrial is necessary. This question will face the Court if certiorari is granted. It is discussed here in the event that the Court wishes to consider summary reversal.

Respondent is relying on the Workmen's Compensation Act in order to defeat petitioner's cause of action. If under the *Byrd* case the issue upon which respondent relies was one for the jury to determine, then respondent should have requested that the jury be charged on the question. It is respondent who is objecting to the jury verdict for petitioner. It is respondent who is insisting that petitioner's cause of action should be dismissed because the remedy under the Workmen's Compensation Act is exclusive. Patently, since petitioner was not urging the dismissal of his own cause of action, there was no necessity for petitioner to see to it that the jury was instructed as to the circumstances under which his cause of action might fail.

Rule 51 of the Federal Rules of Civil Procedure provides for the filing of written requests for instructions to the jury. The Rule further provides:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its ver-

dict, stating distinctly the matter to which he objects and the grounds of his objection."

While respondent entered a general objection to the charge by the judge, and an objection to the failure of the court to instruct on those of its special requests which had been rejected (R. 197a), respondent neither requested the court, nor objected to its failure, to charge the jury as to the circumstances under which the Workmen's Compensation Act would apply so as to defeat the cause of action. Respondent was content to ask for a binding instruction in its Request No. 7. This Request did not even advise the jury that only those employees engaged in the regular course of respondent's business were covered by workmen's compensation. The Request rather was specifically tailored to withdraw from the jury not only the question of "regular course of the business," but also the question of whose employee Ormsbee was intended to be.

Failing to obtain the binding instruction which it requested, respondent did not care to have the issue submitted to the jury. When the trial court asked counsel if there was anything further which they desired to have added to the charge, respondent's counsel requested additional instructions in connection with contributory negligence, and after these were given, he specifically stated that there was nothing further on which he desired to have the jury charged (R. 195a-196a).

The record does not show why the respondent did not ask for instructions to the jury on the "employee" issue under the Act. Perhaps respondent did not object to the omission in the charge because it assumed, along with the trial court, that under Pennsylvania practice

the issue was solely one for the court, even though the court be federal. On the other hand, respondent's strategy was to center the jury's entire attention on the trespasser issue, which was its principal line of defense. It may, therefore, not have desired to have the jury instructed that Ormsbee might be an unusual type of employee who was not even covered by workmen's compensation. Such an instruction might have made Ormsbee look less like a trespasser in the eyes of the jury. Respondent, therefore, could well have considered it advantageous from its point of view not to have its secondary position—that the Workmen's Compensation Act controlled—submitted to the jury, except upon a binding instruction.

It is of course not material as to why respondent decided to forego its privilege of requesting jury instructions. It does not matter whether it mistook the law, or took a calculated strategic risk. It has long been settled that parties who fail to request charges, for whatever reasons may appeal to them, cannot later impose upon the court and the other party the burden of retrial.

Thus this Court has held, in an opinion by Mr. Justice Holmes, that where a binding instruction was requested, which was properly denied, and which was not followed by a request for submittal of the issue to the jury on proper instructions, no claim of error can be made because of the failure of the court to instruct the jury. *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U.S. 13. The *Louisville* case involved a damage action which would lie only if plaintiff's employment was in intrastate commerce. The defendant asked for a directed verdict that the plaintiff was engaged in interstate commerce, and this request was denied. De-

fendant did not ask for the opportunity to have the issue submitted to the jury, possibly because the judge assumed throughout that intrastate commerce alone was involved. As Mr. Justice Holmes stated, at p. 15:

> "It is true that the Judge seems to have assumed that the business in hand was intrastate, but the only objection indicated was to his not ruling the contrary and as the Railroad did not ask to go to the jury and the only ruling requested was properly denied the judgment must stand."

In fairness to the trial court and the other party, an erroneous charge on the law, or an omission from the charge, must be specifically called to the trial court's attention. If this is not done, the complaining party cannot later contest the jury verdict. *Palmer* v. *Hoffman,* 318 U.S. 109, 119; *Pennsylvania R. R. Co.* v. *Minds,* 250 U.S. 368, 375. Where there is no request for a charge, nor objection to the charge as given, the verdict should stand in the interest of ending litigation. *United States* v. *Atkinson,* 297 U.S. 157, 159; *Humes* v. *United States,* 170 U.S. 210; *Texas & Pacific Railway* v. *Volk,* 151 U.S. 73, 78.

Consequently, if certiorari is granted, and the judgment below is reversed, we believe that this Court should make it clear that the jury verdict should be reinstated, and that there is no necessity for a new trial. It is respectfully pointed out that the problem as to the nature of the mandate that should issue here is different from that in the *Byrd* case. In the *Byrd* case, petitioner, before completing his case, induced the trial court to strike respondent's defense based on the Workmen's Compensation Act. The trial court gave respondent an exception to the striking of its defense. Thus petitioner effectively prevented any submittal of

the issue to the jury.[10] With the record on the issue incomplete, and the respondent's defense stricken, there was no issue on which the jury could have been instructed. In the instant case this procedural situation did not prevail. All of the testimony was taken. The trial court made no determination on its own of the issue of workmen's compensation prior to the submittal of the case to the jury. Respondent thus was at all times free to seek a jury decision on this issue, as well as on any of the other issues upon which it wished to rely in persuading the jury to find for it.

In short, if this Court holds in the instant case that under the *Byrd* precedent the employment status of Ormsbee was one for the jury to decide, then the jury verdict must stand, since respondent cannot demand another chance before another jury to request appropriate instructions. Respondent should not gain a fresh opportunity before another jury to retry all the issues in this case, simply because it failed to ask for a jury charge on one issue. Such a *seriatim* approach would be burdensome to the litigants and a mockery of that sound judicial administration which is reflected in Rule 51 and the cases cited.

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[10] As this Court stated in its opinion in *Byrd*: "His [petitioner's] motion to dismiss the affirmative defense, properly viewed, was analogous to a defendant's motion for involuntary dismissal of an action after the plaintiff has completed the presentation of his evidence." 356 U.S. at 532.

CONCLUSION

For the foregoing reasons the petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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OCTOBER, 1958.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,518

JACKSON D. MAGENAU, ADMINISTRATOR OF THE ESTATE OF NORMAN ORMSBEE, JR., DECEASED,

v.

AETNA FREIGHT LINES, INC., *Appellant.*

A peal From the United States District Court for the Western District of Pennsylvania

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Argued May 8, 1958

Before MARIS, GOODRICH and HASTIE, *Circuit Judges*

OPINION OF THE COURT

(Filed July 17, 1958)

By GOODRICH, *Circuit Judge*.

This is an appeal from the District Court for the Western District of Pennsylvania upon a judgment entered in a death by wrongful act case in favor of the administrator of Norman Ormsbee, Jr. The recovery was based on the alleged negligence of the defendant and there was also a finding by the jury that the defendant was guilty of "wanton conduct." The defendant attacks the verdict and judg-

ment on several grounds. The case is in federal court by diversity only and we look to the relevant Pennsylvania decisions.

The first question involves points of tort and agency law. The driver of the truck which was leased to the defendant, Aetna Freight Lines, Inc., had been encountering difficulties while enroute to Midland, Pennsylvania. A day or two prior to the accident there had been brake trouble which defendant's superintendent at Buffalo had endeavored to adjust. On the afternoon of the day in question the driver, Schroyer, stopped at Jones's Tavern at Waterford, Erie County, Pennsylvania. There he complained to the proprietor that he was having trouble with his brakes. Shortly thereafter the decedent, Ormsbee, and a man named Herbert Brown, entered the tavern. Schroyer offered Brown $25.00 if he would accompany him on the remainder of the trip to Midland stating that he, Schroyer, was afraid he was going to run into trouble. Brown declined the offer. Schroyer thereupon asked Ormsbee to accompany him and he agreed to for the price of $25.00. The two men got into the tractor. This was the last time they were seen alive. Later that evening state police received a call and in answer thereto found the tractor-trailer off the highway over an embankment and both men dead. This is all the evidence we have except further details of the difficulties which the driver had had with this truck in the earlier part of his trip and the results of a post accident investigation.

The jury was given forthright interrogatories on this phase of the case. They are, with the answers thereto, as follows:

1. "Under the evidence in this case, do you find that an unforeseen contingency arose which made it reasonably necessary for the protection of the defendant's interests that the driver Charles Schroyer engage the decedent Norman Ormsbee, Jr. to accompany him for the remainder of the trip?" Answer: "Yes."

2. "Was the defendant Aetna Freight Lines, Inc. negligent in the maintenance of the equipment or in the operation of the vehicle by the driver Charles Schroyer, either or both, which negligence was the proximate cause of the death of Norman Ormsbee, Jr.?" Answer: "Yes."

3. "Do you find that the braking equipment upon the vehicle in question, considering its size and load and road conditions prevailing, was in proper working order on March 20, 1956?" Answer: "No."

The answer to the first question is attacked by the defendant as being based on insufficient evidence.

The rule of law governing the situation is not so difficult. It is stated in the Restatement as follows:

> "If a servant is authorized or apparently authorized to invite persons upon the vehicle . . . of the master, a person so invited is a guest of the master and if the entry is for business purposes, he is a business visitor." 1 RESTATEMENT, AGENCY 2d § 242, com. *b* (Tent. Draft No. 4, 1956) (not in 1st ed.).
>
> "Unless otherwise agreed, an agent is authorized to appoint another agent for the principal if:
>
> ". . .
>
> "(d) an unforeseen contingency arises making it impracticable to communicate with the principal and making such an appointment reasonably necessary for the protection of the interests of the principal entrusted to the agent." 1 RESTATEMENT, AGENCY 2d § 79(d) (Tent. Draft No. 3, 1955) (same as in 1st ed.). See also Illustration 5 to this section (ill. 6 in the 1st ed.).

The Pennsylvania cases emphasize the necessity of the "emergency." See, *e.g.*, *Jaeger v. Sidewater*, 366 Pa. 481, 77 A.2d 434 (1951); *Jacamino v. Harrison Motor Freight Co.*, 135 Pa. Super. 356, 5 A.2d 393 (1939).

Thus the matter turns in the final analysis on a question of fact, that is, a sufficient state of emergency to justify the enlisting of another to help assist in the business to be done.

The jury's finding is a forthright answer to a forthright question. The trial judge who heard all the testimony was satisfied with it. We do not think on this state of the record that we would be justified in setting it aside.

The defendant strongly urges the proposition that if the evidence is sufficient to sustain the conclusion that there was an emergency situation to justify the conclusion that

Schroyer had authority to employ Ormsbee to assist him, then the Pennsylvania Workmen's Compensation Act will be the sole basis for recovery. In rejecting this contention, the trial judge relied upon *D'Alessandro v. Barfield*, 348 Pa. 328, 35 A.2d 412 (1944). That was a case involving the "statutory employee" section of the statute, § 203, 77 PA. STAT. ANN. § 52 (Purdon 1952).[1] The Pennsylvania court said that § 203 was not involved, since the accident had occurred outside the employer's premises. There had been a judgment for the plaintiff in the trial court and the affirmance let this stand, the court saying that the "sole question" for its consideration was whether § 203 applied.

But *D'Alessandro* does not settle the argument of the defendant. It points out the definition of "employee" in § 104 of the statute[2] which includes "All natural persons, who perform services for another for a valuable consideration, *exclusive of persons whose employment is casual in character, and not in the regular course of business of the employer*. . . ." (Emphasis added.)

It is the exclusion part of the paragraph with which we are here concerned. Defendant concedes that the employment of Ormsbee was "casual," a correct concession as the discussion and authorities cited in Skinner will show.[3] But to be outside the coverage of the act, the employment must both be casual and not in the regular course of business. The Pennsylvania Supreme Court has said that both conditions must be met. *Pershing v. Citizens' Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928), is right in point. See also, *Booth v. Freer*, 133 Pa. Super, 594, 3 A.2d 205 (1938); *Sones v. Thompson Furniture Co.*, 163 Pa. Super. 392, 62 A.2d 116 (1948). "The regular course of business means an ordinary operation which may be required to carry out the master's work," said the court in the *Persing* case.

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[1] "An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

[2] 77 PA. STAT. ANN. § 22 (Purdon 1952).

[3] 1 SKINNER, PENNSYLVANIA WORKMEN'S COMPENSATION LAW 100-10 (4th ed. 1948, Supp. 1958).

This question, Skinner declares is "a question of law, and open to review."[4] We cannot escape the conclusion that the finding that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all.

Facts in the various cases applying the phrase vary widely, as one would expect. We are helped by the statement of principle in *Callihan v. Montgomery*, 272 Pa. 56, 72, 115 Atl. 889, 895, "The Legislature evidently intended, by the use of the words 'regular course,' to give them some definite significance, and the most natural meaning is that they refer to the normal operations which regularly constitute the business in question, excluding incidental or occasional operations arising out of the transaction of that business. . . ."

That, we think, is this case. The other matters raised do not require separate discussion.

The judgment of the district court will be reversed.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

JULY 17, 1958

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[4] *Id.* at 100 & n. 90. See, *e.g.*, Ciccocioppo v. Rocco, 172 Pa. Super. 315, 94 A.2d 77 (1953).

APPENDIX B

1. The United States Constitution, Amendment VII, provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. Rule 51 of the Federal Rules of Civil Procedure provides:

> "INSTRUCTIONS TO JURY: OBJECTION
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

3. Section 104 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 22, provides:

> "The term 'employe', as used in this act is declared to be synonymous with servant, and includes—
>
> "All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer. Every executive officer of a corporation elected or ap-

pointed in accordance with the charter and by-laws of the corporation, except elected officers of the Commonwealth or any of its political subdivisions, shall be an employe of the corporation."

Section 203 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 52, provides:

"An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employe."

Section 302(b) of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 462, provides:

"After December thirty-first, one thousand nine hundred and fifteen, an employer who permits the entry, upon premises occupied by him or under his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employe or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three, unless the employer shall post in a conspicuous place, upon the premises where the laborer's or assistant's work is done, a notice of his intention not to pay such compensation, and unless there be filed with the department within ten days thereafter, a true copy of such notice, together with proof of the posting of the same, setting forth upon oath or affirmation the time, place, and manner of such posting; and after December thirty-first, one thousand nine hundred and fifteen, any such laborer or assistant who shall enter upon premises occupied by or under control of such employer, for the purpose of doing such work, shall be conclusively presumed to have agreed to accept the compensation provided in article three, in lieu of his right of action under article two, unless he shall have given notice in writing to the employer, at

the time of entering upon such employer's premises for the purpose of doing his work, of his intention not to accept such compensation, and unless within ten days thereafter, there shall have been filed with the department a true copy of such notice, accompanied by proof of service thereof upon such employer, setting forth under oath or affirmation the time, place, and manner of such service. And in such cases, where article three binds such employer and such laborer or assistant, it shall not be in effect between the intermediate employer or contractor and such laborer or assistant, unless otherwise expressly agreed."

Section 427 of the Pennsylvania Workmen's Compensation Act, 77 PURDON'S PA. STAT. ANN. § 872, provides:

"Any party may appeal from any action of the board on matters of the law to the court of common pleas of the county in which the accident occurred or of the county in which the adverse party resides or has a permanent place of business, or, by agreement of the parties, to the court of common pleas of any other county of this Commonwealth: Provided, That no such appeal shall be taken to the court of common pleas of Allegheny County, but in Allegheny County all such appeals shall be taken to the county court of Allegheny County, which shall have exclusive jurisdiction of such appeals."